IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Deborah L. Thorne, not individually but as court-appointed receiver of AlphaMetrix, LLC and AlphaMetrix Group, LLC,	)	
Plaintiff,	)	
v.	)	Case No. 14 C 2472
	)	Judge Manish S. Shah
Aleks Kins, Charley Penna, David Young, Geoff Marcus, and George Brown,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT DAVID YOUNG'S MOTION TO DISMISS

Jonathan E. Green (admitted pro hac vice)
KAYE SCHOLER LLP
425 Park Ave.
New York, NY 10022
jonathan.green@kayescholer.com
(212) 836-8121

Elizabeth R. Pozolo
KAYE SCHOLER LLP
70 West Madison St.
Chicago, IL 60602
elizabeth.pozolo@kayescholer.com
(312) 583-2300

Attorneys for Defendant David Young

TABLE OF CONTENTS

Page

PROCEDURAL BACKGROUND 1

STATEMENT OF FACTS 1

ARGUMENT 4

I. Relevant Legal Standards 4

a. Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6) 4

b. The Business Judgment Rule 5

II. The Complaint Fails to Identify Any Business Decisions That Fell Within Young's Specific Duties as Chief Operating Officer. 6

III. The Complaint Fails to Rebut the Business Judgment Rule Presumption 8

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

CASES

Alberts v. Tuft,
333 B.R. 506 (Bankr. D.D.C. 2005) 6, 7

Aronson v. Lewis,
473 A.2d 805 (Del. 1984) 5

Ashcroft v. Iqbal,
556 U.S. 662 (2009)....................4

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)....................4

Blackmore Partners, LP v. Link Energy LLC,
2005 Del. Ch. LEXIS 155 (Del. Ch. Oct. 14, 2005)....................5

Boles v. Filipowski,
345 B.R. 426 (Bankr. D. Mass. 2006) 11

Brehm v. Eisner,
746 A.2d 244 (Del. 2000) 9

Brehm v. Eisner,
906 A.2d 27 (Del. 2006) 9

Bridgeport Holdings, Inc. Liquidating Trust v. Boyer,
388 B.R. 548 (Bankr. D. Del. 2008)....................6, 13

CDX Liquidating Trust v. Venrock Assocs.,
640 F.3d 209 (7th Cir. 2011) 5

Cede & Co. v. Technicolor, Inc.,
634 A.2d 345 (Del. 1993) 5, 8, 10

Continuing Creditors' Comm. of Star Telecomms., Inc. v. Edgecomb,
385 F. Supp. 2d 449 (D. Del. 2004)....................5, 6, 7

DiRienzo v. Lichtenstein,
2013 Del. Ch. LEXIS 242 (Del. Ch. Sept. 30, 2013) 9

eBay Domestic Holdings, Inc. v. Newmark,
16 A.3d 1, 41 n.135 (Del. Ch. 2010)....................8

Page(s)

Emerald Partners v. Berlin,
726 A.2d 1215 (Del. 1999) 6

Forsythe v. Executive Fund Management Company,
2007 Del. Ch. LEXIS 140, at *26-30, 36-37 (Del. Ch. Oct. 9, 2007) 10, 13

Gantler v. Stephens,
965 A.2d 695 (Del. 2009) 5, 6

Goodman v. H.I.G. Capital, LLC,
491 B.R. 747, 778-79 (Bankr. W.D. La. 2013) 7

Hampshire Grp. Ltd. v. Kuttner,
2010 Del. Ch. LEXIS 144 (Del. Ch. July 12, 2010) 9

In re Bank of Am. Corp. Secs., Derivative and ERISA Litig.,
757 F. Supp. 2d 260 (S.D.N.Y. 2010) 9

In re BioSante Pharms., Inc.,
968 F. Supp. 2d 940 (N.D. Ill. 2013) 12

In re Farmland Indus.,
335 B.R. 398 (Bankr. W.D. Mo. 2005) 7, 8

In re Fedders N. Am., Inc.,
405 B.R. 527 (Bankr. Del. 2009) 10, 11

In re Lear Corp. S'holder Litig.,
967 A.2d 640 (Del. Ch. 2008) 9

In re MFW S'holder Litig.,
67 A.3d 496, 526 n.148 (Del. Ch. 2013) 5

IT Grp. v. D'Aniello,
2005 U.S. Dist. LEXIS 27869 (D. Del. Nov. 15, 2005) 7

Japan Petroleum Co.(Nigeria) Ltd. v. Ashland Oil, Inc.,
456 F. Supp. 831 (D. Del. 1978) 13

Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec,
529 F.3d 371 (7th Cir. 2008) 13

Kaye v. Lone Star Fund V, L.P.,
453 B.R. 645 (Bankr. N.D. Tex. 2011) 6

Malpiede v. Townson,
780 A.2d 1075 (Del. 2001) 8

Page(s)

McPadden v. Sidhu,
964 A.2d 1262, 1266-68, 1274-75 (Del. Ch. 2008)....................10, 11, 13

Mukamal v. Bakes,
378 Fed. Appx. 890 (11th Cir. 2010)....................11

Northbound Grp. v. Norvax, Inc.,
2013 U.S. Dist. LEXIS 170422 (N.D. Ill. Dec. 3, 2013)....................5

Official Comm. of Admin. Claimants v. Bricker,
2010 U.S. Dist. LEXIS 99140 (N.D. Ohio Sept. 22, 2010)....................10

Official Comm. of Unsecured Creditors v. Bay Harbour Master Ltd.,
420 B.R. 112 (Bankr. S.D.N.Y. 2009)....................11, 12

Reed v. Linehan,
463 B.R. 344 (Bankr. N.D. Tex. 2011)....................9

Stanziale v. Nachtomi,
416 F.3d 229 (3d Cir. 2005).................... passim

Stewart v. BF Bolthouse Holdco.,
2013 Del. Ch. LEXIS 215 (Del. Ch. Aug. 30, 2013)....................9, 10

Stone v. Ritter,
911 A.2d 362 (Del. 2006)....................9

THC Holdings Corp. v. Chinn,
1998 U.S. Dist. LEXIS 1276 (S.D.N.Y. Feb. 6, 1998)....................7

Trenwick Am. Litig. Trust v. Ernst & Young,
906 A.2d 168 (Del. Ch. 2006), *aff'd* 931 A.2d 438 (Del. 2007)....................5, 13

Tvi Corp. v. Gallagher,
2013 Del. Ch. LEXIS 260 (Del. Ch. Oct. 28, 2013)....................8, 9, 11

U.S. Commodity Futures Trading Comm'n v. AlphaMetrix, LLC,
Case No. 13 C 4896 (Lefkow, J.)....................1

Virnich v. Vorwald,
664 F.3d 206 (7th Cir. 2011)....................12

Wehrs v. Benson York Grp.,
2011 U.S. Dist. LEXIS 108840 (N.D. Ill. Sept. 23, 2011)....................5

Youkelsone v. Wash. Mut., Inc.,
2010 Bankr. LEXIS 2453 (Bankr. D. Del. Aug. 13, 2010)....................13

Page(s)

STATUTES

7 U.S.C §§ 1 *et seq.*..1

Federal Rule of Civil Procedure 12(b)(6) 1, 4

Defendant David Young submits this memorandum of law in support of his motion to dismiss the complaint (the "Complaint") pursuant to Federal Rule of Civil Procedure 12(b)(6).

PROCEDURAL BACKGROUND

On November 4, 2013, the United States Commodity Futures Trading Commission ("CFTC") filed an action against AlphaMetrix, LLC ("AlphaMetrix") in federal district court, alleging violations of the Commodity Exchange Act, 7 U.S.C. §§ 1 *et seq*. *See U.S. Commodity Futures Trading Comm'n v. AlphaMetrix, LLC*, Case No. 13 C 4896 (Lefkow, J.). Together with its complaint, the CFTC filed a motion for statutory restraining order seeking, among other things, the appointment of a Corporate Monitor for defendant AlphaMetrix, including all funds, assets or commodity pools operated by AlphaMetrix. The court granted the motion and appointed Deborah Thorne of Barnes & Thornburg LLP as Corporate Monitor of AlphaMetrix. On December 18, 2013, Ms. Thorne's role was expanded to Temporary Equity Receiver of AlphaMetrix Group, LLC ("AMG"), and all of AMG's subsidiaries, including AlphaMetrix. On April 7, 2014, Ms. Thorne filed the instant lawsuit against former officers of AlphaMetrix and AMG pursuant to her duties and powers as Receiver.

STATEMENT OF FACTS[1]

David Young was Chief Operating Officer ("COO") of AlphaMetrix and AMG until August 23, 2013.[2] Compl. ¶ 11. AlphaMetrix was a Commodity Pool Operator ("CPO") that offered investors a platform to access commodity pools managed by commodity trading advisors ("CTAs"). Compl. ¶ 14. AlphaMetrix charged fees to the funds that were made available through its platform, including operating and management fees, as compensation for the services it offered. Compl. ¶ 16. In turn, AlphaMetrix used the fees it collected to pay the CTAs' compensation, as well as commissions to the entities responsible for marketing the AlphaMetrix platform. Compl. ¶ 17. AMG was the sole member and manager of AlphaMetrix. Compl. ¶ 13.

---

[1] For purposes of a Rule 12(b)(6) motion, this Court must accept the allegations made in the Complaint as true. Young does not waive his right to contest the facts alleged in the Receiver's Complaint in the event this case proceeds beyond this motion to dismiss.

[2] Accordingly, allegations concerning AlphaMetrix and AMG's management post-August 23, 2013, cannot be used to support the Receiver's claim against Young. *See, e.g.*, Compl. ¶¶ 46-52 (alleging, among other things, the execution of an "Amended and Restated Promissory Note" regarding AMG's debt in September 2013 for which AMG received no consideration; the issuance of a letter in October 2013 disclosing certain concerns regarding AlphaMetrix and AMG's finances that resulted in many investors requesting full redemptions of their investments; and hosting AMG's "most lavish summit yet" in September 2013).

In this action the Receiver alleges that Young, Aleks Kins, the Managing Member of AMG and the President and Chief Executive Officer ("CEO") of AlphaMetrix and AMG; George Brown, the Chief Financial Officer ("CFO") of AlphaMetrix and AMG; Charley Penna, the Chief Risk Officer and Chief Compliance Officer of AlphaMetrix and AMG; and Geoff Marcus, the Chief Strategic Officer of AlphaMetrix and AMG (together with Young, "defendants"), breached their duty of care to AlphaMetrix and AMG. Compl. ¶¶ 8-12, 53.

Specifically, the Receiver alleges that defendants failed to "exercise financial control" over the development of a complex technology platform called the AlphaMetrix Global Marketplace (the "Marketplace") and that Kins, Brown, Penna and Young caused AlphaMetrix to pay for the development of the Marketplace, even though it was to be AMG's asset and ultimately was not fully functional. Compl. ¶¶ 20-23. The Receiver also claims that, "[d]espite their positions as COO, CFO and Chief Risk Officer, Young, Brown and Penna acquiesced to [the] practice of employing Kins's family members and paying Kins's personal expenses." Compl. ¶¶ 26, 37. In addition, the Receiver alleges "defendants launched a series of extravagant summits that ended up costing the AMG Entities at least $1.6 million that they could ill afford." Compl. ¶ 29.

The Receiver alleges that due to defendants' "mismanagement," AlphaMetrix was unable to fulfill certain financial obligations, including its obligations to pay compensation to CTAs and rebates to pool investors who "provide[d] seed money to start a pool or for other reasons."[3] Compl. ¶¶ 38, 43, 44, 56. The Receiver claims that, "to remedy those cash flow problems" Kins, Penna, Young and Brown authorized the collection of fees in advance, as opposed to in arrears, "increased some of the amounts being passed through to the pools," and misrepresented certain rebates that had not been deposited into the pools as a receivable to the pools. Compl. ¶¶ 38-40, 44. The Receiver also alleges that defendants breached their duty of care by exposing AMG and AlphaMetrix to potential creditor demands in connection with a note acquired by an AMG subsidiary, AlphaMetrix 360, LLC ("AM360"), reflecting the purchase of $23 million debt from White Oak Global Advisors, LLC ("White Oak") for which AMG provided guarantees and by "moving AlphaMetrix funds up to AMG." Compl. ¶¶ 19, 55.

Separate and apart from the duty of care claim, the Complaint includes claims against all of the defendants, except Young, for breach of the duty of loyalty and unjust enrichment for allegedly taking loans from AMG that were financed with money transferred from AlphaMetrix to AMG. Compl. ¶¶ 58-60, 72-75. The Receiver does not allege that Young breached his duty of loyalty or took any such loans. *Id.*[4]

By the fall of 2013 (after Young had left his position at AlphaMetrix and AMG), AMG began to receive pressure from regulators to make an announcement to investors in the commodity pools concerning the unpaid rebates and CTA compensation. Compl. ¶ 46. In a letter dated October 10, 2013, AlphaMetrix's President and CEO Kins advised all AlphaMetrix pool participants that AlphaMetrix's assets consisted primarily of a receivable from AMG and that AMG was suffering from "significant cash flow issues." *Id.* As a result of Kins's letter and regulatory action taken by the National Futures Association shortly thereafter, many investors began requesting full redemptions of their investments. Compl. ¶ 51. The CFTC subsequently initiated an action against AMG and the Receiver was appointed.[5] *Id*. The Receiver now seeks to recover over $19 million in damages from Young and the other defendants for allegedly breaching fiduciary duties owed to AlphaMetrix and AMG. Compl. ¶ 57.

---

[3] AlphaMetrix's rebate agreements typically required the company to provide fee rebates to investors "by reinvesting the rebated amount back into the pool on behalf of the investor." Compl. ¶ 44.

[4] As a result, this motion is limited to Count I and arguments pertaining to the duty of care claim, the only claim that the Receiver has brought against Young.

ARGUMENT

I. Relevant Legal Standards

a. Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6)

A court must dismiss a complaint if it does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A complaint must establish "more than a sheer possibility that a defendant has acted unlawfully." *Id.*; *see also Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level."). Mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" do not fulfill plaintiff's obligations. *Iqbal*, 556 U.S. at 678 (citations and internal quotation marks omitted). Further "[n]aked assertion[s] devoid of 'further factual enhancement'" do not suffice. *Id.* at 678 (citing *Twombly*, 550 U.S. at 557).

[5] The Receiver does not allege that Young engaged in any illegal activities or violations of the Commodity Exchange Act.

b. The Business Judgment Rule

Under Delaware law,[6] "if a defendant does not breach his duty of loyalty to the company, he is permitted to rely on the business judgment rule or an exculpatory provision, if applicable, to shield him from liability for a breach of the duty of care." *Continuing Creditors' Comm. of Star Telecomms., Inc. v. Edgecomb*, 385 F. Supp. 2d 449, 462 (D. Del. 2004).[7] The business judgment rule requires courts to presume that corporate officers, in performing actions within the scope of their duties, "acted on an informed basis, in good faith, and in the honest belief that" their actions served the company's best interests. *Gantler v. Stephens,* 965 A.2d 695, 705-706 (Del. 2009) (quoting *Aronson v. Lewis,* 473 A.2d 805, 812 (Del. 1984). *See also In re MFW S'holder Litig.*, 67 A.3d 496, 526 n.148 (Del. Ch. 2013) (citing *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993)).[8] Thus, a plaintiff seeking to hold a corporate officer liable for business decisions must plead facts rebutting the business judgment rule to survive a motion to dismiss.

Facts suggesting a corporate officer undertook an unsuccessful business strategy do not suffice to rebut the business judgment rule's protective presumption. *Trenwick Am. Litig. Trust*

---

[6] The Receiver's claims are before this Court on the basis of supplemental jurisdiction, which requires the application of Illinois choice-of-law rules. *See Wehrs v. Benson York Grp.*, 2011 U.S. Dist. LEXIS 108840, at *16-17 n.12 (N.D. Ill. Sept. 23, 2011). Pursuant to Illinois' "internal affairs" doctrine, the law of the state of formation for limited liability companies applies to breach of fiduciary duty claims. *See CDX Liquidating Trust v. Venrock Assocs.*, 640 F.3d 209, 212 (7th Cir. 2011); *Northbound Grp. v. Norvax, Inc.*, 2013 U.S. Dist. LEXIS 170422, at *56 (N.D. Ill. Dec. 3, 2013). Because both AlphaMetrix and AMG are Delaware limited liability companies, Delaware law applies to the Receiver's breach of fiduciary duty claim against Young.

[7] The AlphaMetrix Limited Liability Company Agreement exculpates corporate officers from acts and omissions arising out of their company activities, absent *gross negligence*, fraud or bad faith. Because Delaware courts analyze duty of care claims using a gross negligence standard, this exculpatory clause is coterminous with the case law cited herein. *See infra* Section III.

[8] The business judgment rule equally applies in the limited liability company context. *See Blackmore Partners, LP v. Link Energy LLC,* 2005 Del. Ch. LEXIS 155, at *24-29 (Del. Ch. Oct. 14, 2005).

v. Ernst & Young, 906 A.2d 168, 193 (Del. Ch. 2006), *aff'd* 931 A.2d 438 (Del. 2007). Instead, Delaware law requires a plaintiff to affirmatively plead facts demonstrating the corporate officer breached a fiduciary duty of loyalty or care to the company. *Gantler*, 965 A.2d at 706; *Emerald Partners v. Berlin*, 726 A.2d 1215, 1221 (Del. 1999)). As explained below, the Receiver fails to adequately plead that Young breached his duty of care to AlphaMetrix or AMG. Therefore, this Court should dismiss the Receiver's Complaint against Young.

II. The Complaint Fails to Identify Any Business Decisions That Fell Within Young's Specific Duties as Chief Operating Officer

As a threshold matter, this Court should dismiss the Receiver's claim against Young because the Receiver engages in group pleading and fails to allege a single act of wrongdoing, negligence or omission specifically committed by Young. Although an officer owes fiduciary duties to the entity he represents, "the scope of those duties is restricted necessarily to those activities within each officer's control." *Alberts v. Tuft*, 333 B.R. 506, 526 (Bankr. D.D.C. 2005) (applying Delaware law). To state a claim for breach of the duty of care, the complaint must specify the officers' responsibility for the alleged wrongdoing and cannot lump all of the officer defendants together without alleging how a particular officer was responsible for each decision at issue. *See id.*; *Bridgeport Holdings, Inc. Liquidating Trust v. Boyer*, 388 B.R. 548, 573, 575 (Bankr. D. Del. 2008) (dismissing breach of fiduciary duty claims against corporate officers because the complaint failed to plead how asset sale was within the scope and authority of each officer's individual office). Conclusory allegations that an officer participated in the at-issue transactions do not suffice to state a claim for breach of fiduciary duty. *Kaye v. Lone Star Fund V, L.P.*, 453 B.R. 645, 681 (Bankr. N.D. Tex. 2011) (applying Delaware law).

For example, in *Edgecomb*, the court dismissed a breach of fiduciary duty claim against a CFO because the complaint merely alleged that the CFO assisted the CEO in the at-issue transaction, and was generally a member of the CEO's "team." 385 F. Supp. 2d at 466.[9] The court explained that plaintiff's allegation that the CFO participated in the transaction as an officer, without more, was insufficient to support further discovery regarding the extent of his involvement. *Id.* Similarly, in *Goodman v. H.I.G. Capital, LLC*, the court dismissed a fiduciary duty claim against three corporate directors where the plaintiff repeatedly identified the officers "collectively" as "H.I.G. Employees," failed to set forth specific allegations with respect to the individual defendants and did not provide context that would support an inference that the actions at-issue were undertaken collectively. 491 B.R. 747, 778-79 (Bankr. W.D. La. 2013) (applying Delaware law). Accordingly, to survive a motion to dismiss, the Receiver must plead to what extent Young was involved in each alleged action and how the alleged breaches fell within the scope of his duties as COO.

The Receiver's Complaint, however, does not allege a single fact to support how the allegations fell within Young's duties or responsibilities as COO, or otherwise allege that Young was involved in the decisions at issue. In fact, nearly all of the Receiver's allegations fail to specify how each individual defendant was responsible for any of the decisions. *See* Compl. ¶¶ 18, 21-23, 26, 38-39, 42, 44, 47, 51. This style of group pleading does not suffice to state a claim against a corporate officer for breach of fiduciary duty. *Alberts*, 333 B.R. at 526. In the few instances that the Receiver identifies a particular defendant as the party responsible for an action, she identifies defendants other than Young. For example, the Receiver alleges that

[9] *See also In re Farmland Indus.*, 335 B.R. 398, 410 (Bankr. W.D. Mo. 2005) (citing Delaware law in dismissing a claim against a corporate officer where the officer was only named in the caption, the section discussing the parties to the action, and the list of defendants in two counts); *IT Grp. v. D'Aniello*, 2005 U.S. Dist. LEXIS 27869, at *41-42 (D. Del. Nov. 15, 2005) (dismissing breach of duty of care claim against an officer because the plaintiff made no allegations relating to actions he took in his capacity as an officer); *THC Holdings Corp. v. Chinn*, 1998 U.S. Dist. LEXIS 1276, at *23-24 (S.D.N.Y. Feb. 6, 1998) (same).

Marcus was in charge of the summits in his capacity as Chief Strategic Officer. Compl. ¶ 30. Likewise, the Receiver alleges that President and CEO Kins made the decision to develop the technology platform, issued orders to the consultants that increased platform costs and assigned the patent rights of the Marketplace to AMG. Compl. ¶¶ 20, 21, 23. The Receiver further alleges that Kins directed Penna and Young to increase "some of the amounts being passed through to the pools . . . [as] part of [AlphaMetrix's] cash flow plan." Compl. ¶ 40.

Notably, the Receiver does not allege that Young played any role in planning the summits, developing the Marketplace, executing or managing the loans at issue, making employment decisions with respect to Kins's family or any other financial strategy discussed in the Receiver's Complaint. The fact that Young was COO does not make him liable for decisions made by other officers. *See In re Farmland Indus.*, 335 B.R. 398, 410 (Bankr. W.D. Mo. 2005). Therefore, this Court should dismiss the Complaint against Young.

III. The Complaint Fails to Rebut the Business Judgment Rule Presumption

Delaware law protects corporate officers from liability for actions taken within the scope of the duties prescribed by their particular office, and courts "will not second-guess these business judgments" unless the plaintiff can otherwise plead facts sufficing to rebut the business judgment rule's presumption. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 41 n.135 (Del. Ch. 2010) (quoting *Cede*, 634 A.2d at 36). To successfully state a claim against a corporate officer for breaching a fiduciary duty of care, a plaintiff must plead facts demonstrating that the officer used a grossly negligent decision-making process in carrying out his or her duties as a corporate officer. *See Tvi Corp. v. Gallagher*, 2013 Del. Ch. LEXIS 260, at *40-41 (Del. Ch. Oct. 28, 2013); *Stanziale v. Nachtomi*, 416 F.3d 229, 241 (3d Cir. 2005) (interpreting Delaware law); *Malpiede v. Townson*, 780 A.2d 1075, 1096 n.76 (Del. 2001); *see* *also Hampshire Grp. Ltd. v. Kuttner*, 2010 Del. Ch. LEXIS 144, at *35-36 (Del. Ch. July 12, 2010).[10]

To plead gross negligence, a plaintiff must allege that defendant's actions were "recklessly uninformed or [the director] acted outside the bounds of reason." *DiRienzo v. Lichtenstein*, 2013 Del. Ch. LEXIS 242, at *100 (Del. Ch. Sept. 30, 2013).[11] The gross negligence standard is "extremely stringent" in the corporate law context. *See In re Bank of Am. Corp. Secs., Derivative and ERISA Litig.*, 757 F. Supp. 2d 260, 338 (S.D.N.Y. 2010) (quoting *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 652 n.45 (Del. Ch. 2008) (comparing Delaware's gross negligence standard to that which governs the liability of government officials for discretionary actions)). Moreover, under Delaware law, claims for breach of the duty of care *do not apply* to the *merits* of particular business decisions. *Stanziale*, 416 F.3d at 242.[12] Rather, a plaintiff must allege that the corporate officer used an "irrational decision-making *process*" in making the business decisions at issue, such as failing "to consider all material information reasonably available." *Id.* at 241-242 (citing *Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000)) (emphasis added). *See also TVI Corp.*, 2013 Del. Ch. LEXIS 260, at *40-41 ("The duty of care

---

[10] Further, even if Delaware law allowed corporate officer liability for ordinary negligence, the AlphaMetrix LLC Agreement exculpates corporate officers from acts and omissions arising out of their company activities, absent *gross negligence*, fraud or bad faith.

[11] *See also Stewart v. BF Bolthouse Holdco.*, 2013 Del. Ch. LEXIS 215, at *32 (Del. Ch. Aug. 30, 2013) ("[G]ross negligence is conduct that constitutes reckless indifference or actions that are without the bounds of reason."); *Reed v. Linehan*, 463 B.R. 344, 410 (Bankr. N.D. Tex. 2011) (stating Delaware law defines gross negligence as acts "so off the mark as to amount to recklessness or a gross abuse of discretion").

[12] The Third Circuit, applying Delaware law, explained that substantive review of business decisions occurs where a plaintiff alleges the officer or director defendant acted in bad faith or committed waste. *Stanziale*, 416 F.3d at 240. *See also Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (discussing elements of "bad faith" claim); *Brehm v. Eisner*, 906 A.2d 27, 74 (Del. 2006) (discussing elements of "waste" claim). The Receiver does not make either of these allegations against Young.

. . . is a process-oriented duty, and merely alleging that defendants made poor business decisions does not rebut the business judgment rule or state a claim for a breach of the duty of care.”).[13]

Cases in which courts have found gross negligence adequately pled are instructive. For example, in *McPadden v. Sidhu*, the court found that the plaintiff pled gross negligence by alleging that the director defendants allowed the officer of a subsidiary to drive a sale transaction without engaging an investment bank and approved the sale despite a faulty and unreliable fairness opinion. 964 A.2d 1262, 1266-68, 1274-75 (Del. Ch. 2008).[14] Similarly, the court in *Forsythe v. ESC Fund Management Company* held that the plaintiff successfully pled gross negligence with allegations that the General Partner of a private equity fund, owned by three unaffiliated directors, failed to oversee the decision-making of the Special Limited Partner and Investment Advisor as required by the fund’s offering documents and, despite a large drop in the fund’s value, took no steps to determine if the fund transferred investments at a reasonable price, allowed high-level officers with conflicts of interest to run the Special Limited Partner and Investment Advisor, and only held one meeting annually where the only business conducted was tax-return sign-offs. 2007 Del. Ch. LEXIS 140, at *26-30, 36-37 (Del. Ch. Oct. 9, 2007). *See also Official Comm. of Admin. Claimants v. Bricker*, 2010 U.S. Dist. LEXIS 99140, at *38-39 (N.D. Ohio Sept. 22, 2010) (applying Delaware law) (holding that complaint properly pled sufficient facts to suggest that officers acted grossly negligent by failing to stop the dissipation of corporate assets *after* the corporation filed for Chapter 11 protection); *Boles v. Filipowski*, 345 B.R. 426, 450-51 (Bankr. D. Mass. 2006) (applying Delaware law) (holding that CEO breached his duty of care because as CEO he was directly involved in company oversight, and therefore failing to abandon a strategy of acquiring distressed companies after the company was insolvent constituted reckless indifference to harm to the company).[15]

---

[13] *See also Stewart*, 2013 U.S. Dist. LEXIS, at *32 (“The focus of a duty of care analysis is not the substance of the decision . . . but rather the process they undertook in making it.”); *In re Fedders N. Am., Inc.*, 405 B.R. 527, 539 (Bankr. Del. 2009) (citing *Cede*, 634 A.2d at 368) (explaining how behavior constituting gross negligence “generally requires . . . officers to fail to inform themselves fully and in a deliberate manner.”).

[14] The *McPadden* court nevertheless dismissed the claim against the director defendants because the corporate charter contained a clause exculpating gross negligence, and the allegations against the director defendants did not rise to the level of bad faith to state a claim for breach of the duty of loyalty. 964 A.2d at 1275.

Conversely, in *TVI Corporation v. Gallagher*, the court dismissed plaintiff's duty of care claim against officers and directors who allegedly failed to obtain revenues from their patents and technologies despite marketing efforts, spent $350,000 of cash reserves per month, entered into lucrative employment agreements with each other, approved a $3.35 million dollar note to the CEO with favorable terms, allowed several directors to misappropriate and divert company assets, and attempted to sell the company at below market value. 2013 Del. Ch. LEXIS 260, at *5-12, 40-41. The court found that dismissal was required because none of the allegations related to defendants' decision-making process. *Id.* at *41-42. *See also Mukamal v. Bakes*, 378 Fed. Appx. 890, 902 (11th Cir. 2010) (applying Delaware law) (holding that complaint failed to allege officers did not use a rational decision-making process in deciding to obtain additional loans instead of filing for bankruptcy, and allegations of the officers' failure to follow the advice of outside consultants did not suffice to state a claim for breach of the duty of care).[16] The obvious pattern from these cases is that a plaintiff can adequately plead gross negligence by focusing on a deficient decision-making process, but is forbidden from alleging a breach of duty of care by attacking the substance of the decision itself.

---

[15] Alternatively, courts have found successful pleadings of bad faith or a breach of the duty of loyalty to suffice for a breach of fiduciary duty of care claim. *See, e.g.*, *McPadden*, 964 A.2d at 1265-67, 1275-76 (holding plaintiff alleged the Vice President breached his duty of *care or loyalty* by intentionally manipulating financial statements to make the company's earnings appear artificially low and solicited only two bids for the sale of the company). However, the Receiver does not allege Young acted in bad faith or breached his duty of loyalty.

[16] *See also Stanziale*, 416 F.3d at 241 n.17 (noting that "cutting fares unprofitably and expanding international routes in the middle of a business downturn" appear to "constitute garden variety business judgments"); *In re Fedders N.Am., Inc.*, 405 B.R. 527, 541 (Bankr. Del. 2009) (finding that allegations that officers took on additional debt when the company was insolvent insufficient to state a breach of fiduciary duty claim); *Official Comm. of Unsecured Creditors v. Bay Harbour Master Ltd.*, 420 B.R. 112 (Bankr. S.D.N.Y. 2009) (applying Delaware law) (holding that plaintiff's allegations amounted to

Here, the allegations in the Complaint do not rise to the extremely stringent standard required to establish that Young and the other defendants used a grossly negligent decision-making process at the pleading stage.[17] The Receiver does not explain how or whether Young took part in the decision-making process let alone allege any facts suggesting that he acted recklessly with respect to that process. Instead the Complaint attacks the *substance* of each decision, which is precisely what the business judgment rule forbids. *See, e.g.*, *Stanziale*, 416 F.3d at 240. Notably, the Receiver describes the officers' actions as "mismanagement" that caused AlphaMetrix to be unable to fulfill obligations to certain investors, CTAs, and creditors. While we dispute the characterization, as a matter of law, "mismanagement" does not suffice to state a claim here. In any event, strategic decisions such as whether to spend money on the summits or develop the Marketplace, lay at the heart of the protection afforded by the business judgment rule. *See Official Comm. of Unsecured Creditors v. Bay Harbour Master Ltd.*, 420 B.R. 112, 153 (Bankr. S.D.N.Y. 2009) (applying Delaware law and holding that mere allegations

---

errors in business judgment and not gross negligence where plaintiffs pled that defendants failed to plan for a cash shortfall, failed to plan for delays in acquisition of company merchandise, and failed to implement an adequate plan to move merchandise between stores because all of plaintiffs' allegations related to errors in business judgment).

[17] The Receiver attempts to meet the gross negligence standard by sprinkling the term "reckless" throughout the Complaint. *See, e.g.*, Compl. ¶ 1 ("defendants recklessly squandered"); ¶ 2 ("defendants pursued a reckless course of dealing"). However, this Court should not consider these types of conclusory statements in determining whether the Receiver stated a plausible claim for relief. *See In re BioSante Pharms., Inc.*, 968 F. Supp. 2d 940, 945 (N.D. Ill. 2013) (citing *Virnich v. Vorwald*, 664 F.3d 206, 212 (7th Cir. 2011)) ("[C]onclusory allegations . . . are not entitled to [the] presumption" of truth.).

of poor business decisions do not state a claim for breach of the duty of care).[18] The companies' subsequent failure does not vitiate this protection — indeed, the freedom to make a decision that later turns out poorly is precisely why the business judgment rule exists. *Trenwick Am. Litig. Trust*, 906 A.2d at 193.

Further, unlike the defendants in *McPadden* and *Forsythe*, the Complaint does not allege that Young had any oversight over these decisions in his role as COO. Specifically, the Complaint alleges that other defendants were in charge of the summits (Compl. ¶ 30), and made decisions with respect to the Marketplace, hiring and expenses (Compl. ¶¶ 20-21, 23, 24-25, 27-28, 40-41, 45). Furthermore, the Complaint does not allege how Young would have even known of the existence of the other officers' loans, let alone had oversight authority to ensure the conduct did not occur. (*See* Compl. ¶¶ 34-37).

Even assuming *arguendo* that Young "acquiesced" to these decisions, as the Receiver suggests, this would not amount to a breach of Young's duty of care to AlphaMetrix or AMG. An officer has no affirmative duty to second-guess decisions relating to areas of the business for which he has no oversight responsibilities. *See Bridgeport Holdings*, 388 B.R. 548 at 575; *see also Stanziale*, 416 F.3d 234 n.5. Accordingly, this Court should dismiss the Complaint against Young.[19]

---

[18] The alleged decision by the defendants to allow AMG to sweep up the AlphaMetrix funds does not constitute improper corporate action absent some personal benefit to the officers akin to self-dealing or a breach of the duty of loyalty. *See, e.g.*, *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 380, 383-84 (7th Cir. 2008) (citing *Japan Petroleum Co.(Nigeria) Ltd. v. Ashland Oil, Inc.*, 456 F. Supp. 831, 846 (D. Del. 1978)); *Youkelsone v. Wash. Mut., Inc.*, 2010 Bankr. LEXIS 2453, at *32-33 (Bankr. D. Del. Aug. 13, 2010). The Receiver alleges no breach of the duty of loyalty or self-dealing against Young.

[19] The Receiver alleges that the "progress payment" strategy implemented to remedy AlphaMetrix's cash flow problems "conflicted with representations AlphaMetrix had made to [commodity pool] investors in its offering materials" and that defendants generated account statements with misrepresentations regarding the investment of certain rebates. Compl. at ¶¶ 39, 44. The Complaint is devoid of any allegation concerning what actions Young took, if any, to execute the progress payment strategy or

CONCLUSION

For the reasons set forth above, the Complaint should be dismissed against Young, with prejudice.

Dated: June 30, 2014

/s/ Jonathan E. Green

Jonathan E. Green (admitted pro hac vice)
KAYE SCHOLER LLP
425 Park Ave.
New York, NY 10022
jonathan.green@kayescholer.com
(212) 836-8121

Elizabeth R. Pozolo
KAYE SCHOLER LLP
70 West Madison St.
Chicago, IL 60602
elizabeth.pozolo@kayescholer.com
(312) 583-2300

Attorneys for Defendant David Young

---

generate account statements misrepresenting investor rebates and the Receiver has not listed these allegation in the Duty of Care count. Therefore, these conclusory statements should not be used to support a claim against Young. Compl. at ¶¶ 53-57.